In the Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 211–212

EASTERN BUILDING CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court below and the dissenting opinion (R. 19–52)[1] are not yet reported.

[1] The petition seeks review of two judgments of the Court of Claims. Both were rendered in actions for recovery of rent due under the same lease; and the suit involved in No. 212 sought recovery for a period of time immediately following the period involved in No. 211. The substantive facts and legal questions in both cases are identical and the judgment and opinion in No. 211 are dispositive of No. 212. Accordingly, references in this brief will be made to the record in No. 211, except where otherwise indicated.

16). On December 17, 1920, the Post Office Department in a letter to petitioner pointed out that only the three months' notice cancellation clause would be eliminated (R. 17).

In 1921, petitioner constructed a building on its premises primarily adapted for post-office facilities, and on March 1, 1922, a lease of the property for twenty years from October 1, 1921, was entered into between petitioner and the United States at an agreed rental of $400,000 for the first year and $300,000 for each succeeding year, payable in quarterly installments (R. 14–15). The lease contained no express provisions as to cancellation except on certain contingencies not here material (R. 15). Pursuant to the provisions of the lease the United States entered into possession of the leased premises and continued to occupy them and to pay rent therefor up to and including August 31, 1939 (R. 15–16).

On May 27, 1939, the Acting Postmaster General advised petitioner by letter that the Department elected to cancel the contract as of August 31, 1939, because it was possible to remove all the postal activities to a Government-owned building (R. 16). Petitioner declined to accept the cancellation and advised the Postmaster General that it expected the Government to pay the rent for the remainder of the term in accordance with the contract (R. 17–18). On August 31, 1939, the United States

moved its post office facilities to a Government-owned building which was then completed and available for that purpose (R. 18). Since that date the United States has not occupied nor paid any rental for the premises (R. 18).

Petitioner brought two actions in the Court of Claims, the first (No. 211) seeking the recovery of $250,000 as rent due July 1, 1940 (R. 2–3), and the second seeking the recovery of $75,000 as rent due October 1, 1940 (No. 212, R. 2). The United States defended on the grounds (1) that the cancellation provision of the Act of March 3, 1885, had become an obligation of the contract which was unaffected by subsequent repeal of that provision, and (2) that Congress had failed to appropriate money for payment of the rental on the premises in question.[2] The court below, in an opinion by Chief Justice Whaley and a concurring opinion by Judge Madden, dismissed the petitions on the first of the two grounds of defense urged by the United States. The second defense was not passed upon. Judge

[2] The court below also found that in preparing its estimates for the fiscal year ended June 30, 1940, the Post Office Department took into consideration the fact that a federal building should be ready for occupancy in New York City into which the activities carried on in the leased premises would be transferred, and accordingly included in its estimates rent for the premises for only the first six months of that fiscal year. The total estimates for rent for the various post offices, submitted by the Post Office Department, were reduced $75,000 by the Bureau of the Budget and an additional $150,000 by Congress. (R. 16.)

Littleton filed a dissenting opinion in which Judge Whitaker concurred.

ARGUMENT

Petitioner apparently does not seriously controvert the ruling of the court below that the cancellation provision of the Act of March 3, 1885, which authorized the termination of a lease whenever a post office could be moved into a Government building and was concededly in effect at the date of the execution of the lease (Pet. 3), became in law a part of the contract and would thus, in the absence of its repeal, have supported the Government's cancellation of the lease as of August 31, 1939 (cf. Pet. 17). Petitioner contends, however, that by reason of the Act of June 19, 1922, which repealed the cancellation provision of the Act of March 3, 1885, the situation became the same as if the law of 1885 had never existed, so that if the cancellation clause was written into the contract by the 1885 statute, it was expunged by the repeal of the statute. It consequently contends that the court below erred in failing to give such effect to the Act of June 19, 1922. We submit that this contention is without merit.

1. It is established doctrine that "laws which subsist at the time and place of the making of a contract * * * enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms." *Farmers and Mer-*

chants Bank v. *Federal Reserve Bank,* 262 U. S. 649, 660; *Russell Co.* v. *United States,* 261 U. S. 514, 524; *Northern Pacific Ry.* v. *Wall,* 241 U. S. 87, 91–92; *Rees* v. *City of Watertown,* 19 Wall. 107, 121; *National Surety Corp.* v. *Wunderlich,* 111 F. (2d) 622 (C. C. A. 8); *Compagnie Generale Translantique* v. *American Tobacco Co.,* 31 F. (2d) 663, 666 (C. C. A. 2), certiorari denied, 280 U. S. 555. This principle is explicit or necessarily implicit in every decision of this Court condemning, as an invalid impairment of the obligation of contract under Section 10 of Article I of the Constitution, the retroactive repeal of a state statute which was in effect at the time the contract in question was entered into. *Coombes* v. *Getz,* 285 U. S. 434; *Edwards* v. *Kearzey,* 96 U. S. 595, 601; *Walker* v. *Whitehead,* 16 Wall. 314, 317; *Von Hoffman* v. *City of Quincy,* 4 Wall. 535, 550–554; cf. *Ochiltree* v. *Railroad Company,* 21 Wall. 249, 252–253; *Hawthorne* v. *Calef,* 2 Wall. 10, 21–22. Therefore, the cancellation provision of the Act of 1885 was as much a part of the contract entered into between petitioner and the United States as if the terms of that provision had been fully set out in the lease. Whether the parties to the lease intended that the cancellation clause of the 1885 Act be included is immaterial, for the rule which makes pertinent laws a part of all contracts is independent of the contractors' intention (*Whitfield* v. *Aetna Life Insurance Co.,* 205 U. S. 489, 496; *Modern Brother-*

hood of America v. *Lock,* 22 Colo. App. 409; and cases cited, *supra;* see 2 Restatement, Contracts (1932) sec. 580 (2) (e); *cf.* 3 Williston, *Contracts* (rev. ed.) sec. 615), except of course where the law itself requires an expression of assent to its applicability.[3] There was plainly no such requirement under the 1885 Act.

2. Petitioner, while not specifically challenging the fact that the cancellation clause in the Act of 1885 was a part of the contract, contends that its repeal in 1922 had the effect of eliminating it therefrom and urges that the 1922 Act, as a repeal statute, is entitled to retrospective effect, in sharp contradistinction to the rule as to general legislation, which is customarily accorded only prospective application. But petitioner overlooks the fact that the prospective operation generally given to substantive laws and the retroactive effect frequently given to repeal statutes are merely the

[3] The record discloses an understanding, prior to execution of the formal lease, that the contract would be subject to the cancellation provision of the 1885 Act. Its omission from the lease is not explained. If, as petitioner contends (Pet. 21–23), it was not the intent of the Postmaster General to make the cancellation clause of the 1885 Act a part of the contract, it is sufficient to observe that the statute created an unconditional infirmity in all post office leases, *i. e.* their cancellability on a specified contingency, and the Postmaster General was obviously without any authority to bind the United States in a manner inconsistent with the express directive of Congress. There is nothing in the case, however, to indicate that the Postmaster General had any such intent or that he did not believe that the 1885 statute automatically became a part of the contract; the record clearly displays a belief on his part to the contrary. (R. 16–17.)

result of deriving such a legislative intention from the character of the law or from the particular circumstances surrounding it.

As was pointed out in the concurring opinion of Judge Madden (R. 22–23), repeals of penal, usury and procedural statutes are often held to operate retrospectively because the character of the statutes and the subject matter which they affect justify the imputation of a legislative intent that they operate retrospectively as well as prospectively, in the absence of a saving clause. Repeal legislation may also operate prospectively only, not because of a saving clause, but because its nature and subject matter warrant the assumption that the lawmakers would have intended that it be so applied. For example, this Court has had no difficulty in finding a controlling legislative intent that a repeal statute without any saving clause is not to operate retrospectively where the law which has been repealed has, under the principle discussed above, become part of the obligations of the contract. *United States* v. *Heth,* 3 Cranch 399, 413; *Steamship Company* v. *Joliffe,* 2 Wall. 450, 457; *Twenty Per Cent. Cases,* 20 Wall. 179, 187; *United States* v. *Burr,* 159 U. S. 78, 82–83; *Knights Templars' Indemnity Co.* v. *Jarman,* 187 U. S. 197, 204–205. There can be little doubt that the repeal of a statute authorizing cancellation of a contract would not be construed to operate retroactively if the lessee as well as the lessor were private persons, nor

even, as Judge Madden observed (R. 25), in the present situation if the repeal prejudiced rather than favored the private lessor. There is no reason, therefore, why such a repeal should be construed to operate retroactively when it renounces a privilege which the Government previously enjoyed. While the United States might relinquish through appropriate legislation any right which it had obtained by statute without encountering constitutional difficulties, a voluntary relinquishment of the Government's rights under outstanding contracts is not lightly to be presumed, since statutes divesting public rights are entitled to a strict construction. *Wisconsin Central Railroad* v. *United States,* 164 U. S. 190, 202.

In any case, the legislative history of the repeal Act of 1922 clearly requires its prospective application only. The sole purpose of the repealing statute was to enable the Postmaster General to obtain more favorable terms as to yearly rental in the future negotiation of long term leases. It was repeatedly insisted in the proceedings before Congress and its Committees that this could best be accomplished by making the termination of a lease upon removal from a leased post office to a Government-owned building discretionary rather than mandatory, leaving the question of the insertion of an appropriate cancellation clause in a contract to the judgment of the Postmaster General. Sen. Rep. No. 556, 67th Cong., 2d Sess.; H. R. No.

839, 67th Cong., 2d Sess.; 62 Cong. Rec. 4932, 6911. Here the contract was negotiated a year and a half before, and executed several months before, the enactment of the repeal statute, so that petitioner could only have contracted upon the basis of the automatic cancellation privilege then made mandatory by the 1885 statute. There is nothing to indicate that the Congress had any intent whatsoever to bestow a mere gratuity upon persons situated as was petitioner, which had negotiated its contract and had presumably financed the construction of the leased premises at a time when the 1885 Act automatically applied (see R. 35–36).

For these reasons, the court below properly refused to attribute to Congress an intention that the repealing act of 1922 should apply retrospectively. *Cf. United States* v. *Dickerson,* 310 U. S. 554, 561–562.

3. The question presented involves no conflict and is not one of general importance. The repealing Act of 1922 was passed more than twenty years ago, at a time when the Postmaster General had no authority to enter into a lease for a period in excess of twenty years. Accordingly, any contract of lease into which the terms of the 1885 statute could have entered must since have expired, or, if the lease has been terminated by the Post Office Department, that termination must have occurred some time ago. So far as we are aware, no claims arising out of the termination of a contract of lease

because of removal of the postal enterprise to Government-owned property are pending other than petitioner's. A decision in the instant case would in all likelihood be determinative of the present controversy only, and, in any event, would determine no more than the intention of Congress in passing the repeal statute of 1922.

CONCLUSION

The decision below was correct and the question is not one of general importance. There is no conflict of decisions. We respectfully submit that the petition for a writ of certiorari should be denied.

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